INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	2
Statutes involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	14
Appendix	15

CITATIONS

Cases:

Billings v. *United States*, 232 U. S. 261	9, 10
Brandtjen & Kluge, Inc. v. *United States*, 78 F. Supp. 509	7, 8, 13
City of New York v. *Saper*, 336 U. S. 328	11
Rodgers v. *United States*, 332 U. S. 371	10

Statutes:

Act of June 22, 1938 (Chandler Act), c. 575, 52 Stat. 840, Chapter XI	4, 10
Internal Revenue Code:	
Sec. 23 (26 U.S.C. 23)	2, 6, 15
Sec. 53 (26 U.S.C. 53)	15
Sec. 56 (26 U.S.C. 56)	10, 15
Sec. 122 (26 U.S.C. 122)	2, 4, 6, 11, 16
Sec. 271 (26 U.S.C. 271)	17
Sec. 274 (26 U.S.C. 274)	4, 10
Sec. 292 (26 U.S.C. 292)	6, 10, 18
Sec. 711 (26 U.S.C. 711)	18
Sec. 3771 (26 U.S.C. 3771)	8, 11, 12, 19
Revenue Act of 1942, c. 619, 56 Stat. 798, Sec. 153	11, 12

Miscellaneous:

S. Rep. No. 1631, 77th Cong., 2d Sess. (1942-2 Cum. Bull. 504, 596, 597):	
P. 122	12-13
Pp. 123-124	13-14

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. —

JOHN E. MANNING, AS COLLECTOR OF INTERNAL REVENUE FOR THE FIFTH DISTRICT OF NEW JERSEY, PETITIONER

v.

SEELEY TUBE & BOX COMPANY, A CORPORATION OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of John E. Manning, as Collector of Internal Revenue for the Fifth District of New Jersey, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 20, 1948, reversing the judgment of the United States District Court for the District of New Jersey.

OPINIONS BELOW

The opinion of the District Court (R. 5-10) is reported in 76 F. Supp. 937. The opinion of the Court of Appeals (R. 13-17) is reported in 172 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals was entered on December 20, 1948 (R. 12). By order of Mr. Justice Burton, dated March 5, 1949, the time within which a petition for a writ of certiorari might be filed was extended to and including May 18, 1949 (R. 18). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254.

QUESTION PRESENTED

Because the taxpayer had underpaid its corporate income and excess profits taxes for 1941, the Commissioner assessed deficiencies in the amount of the underpayments plus interest on the deficiencies from the 1941 date when they should have been paid to the date of assessment. Later, after the close of the tax year 1943, it was determined that the taxpayer had suffered a net operating loss during 1943 which resulted in the abatement of the 1941 deficiencies through allowance of the net operating loss carry-back deduction provided by Sections 23(s) and 122(a) and (b) of the Internal Revenue Code.

The question presented is whether the subsequent net operating loss also has the effect of denying to the Commissioner a right to the interest assessed for failure to pay the tax due and owing in 1941.

STATUTES INVOLVED

The pertinent statutory provisions are printed in the Appendix, *infra*, pp. 15-20.

STATEMENT

The facts are not in dispute. The district court adopted as its findings of fact the stipulation of facts upon which the case had been submitted to it (R. 6). They may be summarized as follows:

In its corporate income tax return filed with the Collector for the fiscal period beginning January 1, 1941, and ending September 30, 1941, taxpayer reported an income tax liability of $17,383.59.[1] This, it timely paid in four equal quarterly installments. Taxpayer also filed with the Collector its excess profits tax return for the same period, reporting excess profits tax liability of $27,514.41, likewise paid in time in four equal quarterly installments. These returns were filed on December 15, 1941 (R. 2, 3, 6), and the taxes were assessed by the Commissioner of Internal Revenue on January 12, 1942 (R. 3, 6).

Deficiencies in both income and excess profits taxes were assessed by the Commissioner on August 2, 1943, as follows: corporate income tax in the sum of $11,494.31, together with interest of $1,125.97, and excess profits tax in the sum of $36,294.99, together with interest in the sum of

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[1] The corporate income tax included, in addition to the normal tax, the declared value excess profits tax and the defense tax (R. 6, fn. 1).

$3,555.42. Additional income and excess profits deficiency taxes were assessed on March 21, 1944, in the amounts of $418.43 and $606.43, together with interest in the sums of $56.90 and $82.66, respectively. (R. 3, 6.)[2] The deficiency taxes were not pay (R. 6).

Subsequently, the taxpayer filed with the Collector its corporate income tax return for the fiscal period October 1, 1942, to September 30, 1943.[3] This disclosed a net operating loss of $231,514 for that period, but after audit, the Commissioner determined that the net operating loss did not exceed $218,612. To this the taxpayer subsequently agreed. On March 15, 1944, the taxpayer filed with the Collector a claim for refund in the sum of $17,383.59, the full sum of the corporate income tax which it had paid for the fiscal year beginning January 1, 1941 and ending September 30, 1941; it also filed a claim for refund in the sum of $27,514.41, the full amount of the excess profits tax, which it had paid for the same period. These claims for refund were predicated upon the net operating loss carry-back provided by Section 122 of the Internal Revenue Code. Later, the taxpayer

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[2] Because the taxpayer had gone into bankruptcy on July 7, 1943, the assessments were perfected in the accelerated fashion provided for under Section 274 (a) of the Internal Revenue Code (R. 6). Thereafter, on January 3, 1945, taxpayer filed a petition for an arrangement under Chapter XI of the Bankruptcy Act (Act of June 22, 1938 (Chandler Act), c. 575, 52 Stat. 840). By an amended plan of arrangement, approved June 4, 1945, the taxpayer was revested with title to all its assets. (R. 2.)

[3] An extension having been granted, the return was not filed until March 3, 1944. (R. 6.)

filed amended claims for refund in which it asserted, in addition to its claim for taxes paid, a right to the abatement of its tax liability for the deficiencies which the Commissioner had determined, including interest assessed on those deficiencies. (R. 4-5, 6-7.)

The Commissioner recognized the right of taxpayer to the asserted net operating loss carry-back and determined an overassessment of income and excess profits taxes for the period in question, January 1, 1941 to September 30, 1941. The Commissioner thereupon issued to taxpayer two certificates of overassessment, in one of which (No. 2824944) he certified an overassessment of corporate income tax in the sum of $28,877.90, and in the other (No. 2824943), he certified an overassessment of excess profits tax in the sum of $64,415.83. However, the Commissioner refused to abate the interest assessed on the deficiency taxes. (R. 5, 7.)

There was refunded to taxpayer the total sum of $40,384.66, representing the corporate income and excess profits taxes actually paid for the period in question, less $4,513.34, the interest assessed on the deficiency taxes for the same period, which had not been paid. The balance of the unpaid deficiency assessments was abated. The $4,513.34 withheld was applied to the payment of interest on the deficiency assessments. (R. 5, 7.)

In this suit, brought against the Collector for the recovery of the interest in the amount of $4,513.34 (R. 5), the district court held that the application of the net loss carry-back provisions of the

statute did not extinguish the liability for interest imposed by Section 292 of the Internal Revenue Code from the date the 1941 taxes had originally become due until the date the deficiencies were assessed, and accordingly entered judgment of no cause of action in favor of the Collector (R. 8-9, 11).

On appeal by the taxpayer, the Court of Appeals reversed with directions to enter judgment for the taxpayer (R. 12).

REASONS FOR GRANTING THE WRIT

1. This case presents a question of large and continuing administrative importance in the functioning of the tax laws. The issue involved arises whenever a taxpayer fails to file a correct return within the time prescribed by law, fails to pay the tax based upon such correct return, and subsequently, in a later year, suffers a net operating loss by virtue of which he becomes entitled to a net operating loss carry-back deduction. Internal Revenue Code, Sections 23 (s) and 122 (a) and (b), Appendix, *infra*, pp. 15, 16-17. Cases involving the unused excess profits credit carry-back raise problems identical with those arising in connection with the net operating loss carry-back. See Appendix, *infra*, pp. 18-19. We have been informed by the Treasury Department that there are literally thousands of such cases pending before administrative officials representing in the aggregate an immense amount of revenue, that it will be impracticable to make the necessary adjustments and to

close numbers of these cases unless and until the question at issue is settled, and that many cases already closed may have to be reopened until a definite rule is obtained.

On the basis of a field survey made during March, 1949, the Treasury Department has reported that there were 11,259 previously adjusted cases involving this issue in 1947, and 14,962 such cases in 1948. It is estimated that from 1945 to 1948, inclusive, there were 42,721 cases involving this issue and that, in 1949, there will be 15,912 such cases. The amount of interest revenue involved in these cases is estimated to be $39,720,925. The Treasury concludes that "So long as the carry-back provisions of the Code are effective the issue presented in the Seeley case will be involved in a substantial number of cases, probably not less than 15,000 yearly."[4] Thus it is important from the viewpoint both of taxpayers and the Government that the question here involved be settled by the highest authority at the earliest possible date.

The lower courts have reached conflicting results. The district court in the instant case decided in favor of the Collector, and the court below in favor of taxpayer. In *Brandtjen & Kluge, Inc.* v. *United States,* 78 F. Supp. 509 (D. Minn.), the district court decided the issue in favor of the Government following the decision of the district court below.

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[4] Memorandum from C. W. Stowe, Acting Deputy Commissioner, dated April 1, 1949, to Charles Oliphant, Chief Counsel, Bureau of Internal Revenue, transmitted by Mr. Oliphant to Assistant Attorney General Caudle, on April 8, 1949.

The opinion below concedes that the instant case and *Brandtjen & Kluge, Inc.* v. *United States, supra,* are "pretty close" (R. 17), but notes a factual distinction, which, as pointed out, *infra,* seems insubstantial. Under the circumstances, delay in final determination of the question, incident to further litigation in the lower courts and in particular pending decision by other Courts of Appeals, will work against the public interest.

2. The decision of the court below puts a premium on a taxpayer's failure to meet his tax obligations when they become due. There is no dispute that a taxpayer whose circumstances are identical with those of the respondent, except that he makes prompt and timely payment, would be entitled, upon determination that a net operating loss carry-back was available to him, only to a refund of the taxes paid. He would get no interest on the monies which were paid to, and held by, the Treasury, until such determination. For Section 3771(e) of the Internal Revenue Code, Appendix, *infra,* p. 20, specifically provides that in the case of refunds or credits resulting from application of the carry-back—

> no interest shall be allowed or paid with respect to such part of the overpayment before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board [Tax Court], whichever is earlier.

Yet, under the decision below, the delaying taxpayer retains the use of the money which he should have, but did not pay over, and is, nevertheless, not charged with interest covering the period of his delay. In other words, the taxpayer who meets his lawful obligations gets neither the use of the money nor interest as compensation for his loss of that use, while the delinquent taxpayer retains the use of the money and is not required to compensate the Government for its corresponding loss.[5]

Interest is "but the compensation due for the use of money" or an allowance "for damages caused by delay in discharging a duty." *Billings* v. *United States*, 232 U. S. 261, 285. Since, in tax cases, its

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[5] Suppose, for example, that taxpayers A and B each have the same income, deductions, etc., for the taxable year 1941 and that the correct tax for each, computed without regard to any carry-back, is $1,000. Taxpayer A correctly reports and pays his $1,000 on March 15, 1942. Taxpayer B, due to certain errors, reports and pays only $400 of tax. Taxpayers A and B each sustain a net operating loss in 1943 which, when carried back to 1941, offsets their entire 1941 income. Taxpayer A files claim for refund on his entire $1,000 tax for 1941 on January 1, 1944. On the same date, taxpayer B files claim for refund of $400 tax for 1941. Both claims will be allowed, and interest on the overpayments will be allowed in each case from January 1, 1944. No deficiency will be assessed in the case of B, but unless interest is charged B on $600 from March 15, 1942, to January 1, 1944, B will be placed in a position more favorable than A. The taxpayer who incorrectly reported his income will be the one placed in the favored position. The Government had the right to receive $1,000 from both A and B on March 15, 1942, and the right to hold and use that money, interest-free, until at least January 1, 1944. Under the opinion of the court below, not only does the Government lose the use of B's $600 for that period, but B, who reported his tax incorrectly, has that $600 to use in his business or otherwise, while A, who reported his tax correctly, does not have the use of a similar amount of money.

allowance to the Government rests "on the basic necessity of the Government to collect a carefully estimated sum of money by a particular date in order to meet its anticipated expenditures" (*Rodgers* v. *United States*, 332 U. S. 371, 374), and it is granted even in the absence of statutory provision therefor (*Billings* v. *United States, supra*), it is not to be denied unless Congress has specifically so provided. Here Congress has provided otherwise.

Section 56 of the Internal Revenue Code, Appendix, *infra*, pp. 15-16, as applied to this case, required the taxpayer to pay the amount found by the Commissioner to be due in his deficiency determinations in 1941.[6] No payment having then been made, Section 292(a), Appendix, *infra*, p. 18, required that "interest upon the amount determined as a deficiency * * * be paid * * * from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed".[7]

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[6] Since there is and was no dispute, here relevant, with respect to the correctness of the deficiency determination, the amount so determined plus the amount paid was the "total amount of tax imposed." This entire amount should have been paid, under Section 56, beginning on December 15, 1941.

[7] The interest here involved was that which accrued between the due date of the payment of the taxes on December 15, 1941, and the date of the deficiency assessments of August 2, 1943 and March 21, 1944. (See pp. 3-4, *supra*.) The circumstance that the assessments were perfected here in accelerated fashion, pursuant to special statutory provisions in the case of bankruptcy (Internal Revenue Code, Section 274(a)), is immaterial. The date of bankruptcy was July 7, 1943 (R. 2), and in any event, by a plan of arrangement under Chapter XI of the Bankruptcy Act (Act of June 22, 1938,

The abatement of the principal amount of the deficiency by reason of the net operating loss carry-back did not, *ab initio,* relieve the taxpayer of its liability therefor. It was not until approximately ten months after the tax here involved was due and payable that the net operating loss carry-back was first enacted by Section 153(a) of the Revenue Act of 1942 (Appendix, *infra,* pp. 11-12, which amended Section 122(b) of the Internal Revenue Code. The extinguishment of the tax liability for the fiscal year 1941 resulted, not from a determination that the tax as assessed was illegal, but from the application of this new statutory provision of the Code. The application of this section was to grant a new deduction which had the effect of abating the existing tax deficiency for 1941, but, until the abatement, the Government was entitled to the entire tax. Thus, contrary to the ruling of the court below, taxpayer's liability on December 15, 1941, was not "inchoate" (R. 16) but actual and existent.

That the Government had the right to hold and use the principal amount of the deficiency at least until after the close of the year in which the taxpayer suffered its net operating loss is made perfectly clear by Section 3771(e), already referred to, *supra,* p. 8, which immunizes the Government

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c. 575, 52 Stat. 840), taxpayer, on June 4, 1945, was revested with title to all its assets. Hence, the recent decision of this Court in *City of New York* v. *Saper,* 336 U. S. 328, denying interest on tax claims after bankruptcy, if at all applicable, would diminish the Government's interest claim only to a minor extent.

from any claim to interest for such use. Were the Government's use of such monies illegal, it would be liable for interest. That is the teaching of the decisions relied on by the court below (R. 17) in which the tax was erroneously or illegally collected in the first place. Here, however, there is no question that the deficiencies were correctly assessed and Section 3771(e) indicates plainly that the Government was entitled to the use which taxpayer denied it by failing to make payment.

The Congressional committee which created the net operating loss carry-back deduction [8] plainly contemplated that the possibility of a future carry-back did not relieve the taxpayer of its duty to pay the tax of the prior year when and as due. It said (S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 122, 123 (1942-2 Cum. Bull. 504, 596, 597)): [9]

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[8] Section 153 of the Revenue Act of 1942 was originally proposed by the Senate Finance Committee, whose report contains the following (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 122 (1942-2 Cum. Bull. 504, 596):

> This section, for which there is no corresponding provision in the House bill, amends section 122 of the Code. For the first time a carry-back of the net operating loss is allowed. The net operating loss for any taxable year beginning on or after January 1, 1942, may be carried back to the 2 preceding taxable years (but not to any taxable year beginning before January 1, 1941), and may be included in computing the net operating loss deduction for each such preceding taxable year. The net operating loss for any taxable year which is not used as a carry-back may be carried forward, as under existing law, to the 2 succeeding taxable years.

[9] The full statement of the Committee, with reference to Section 3771 (e), is as follows:

> A taxpayer entitled to a carry-back of a net operating loss or an unused excess profits credit (see sec. 204 of the bill) will not be able to determine the deduction on ac-

> He must therefore file his return and pay his tax without regard to such deduction, and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back.

Thus, the taxpayer owed a tax which was actual and real, and, contrary to the holding of the court below, did not amount to "nothing" (R. 17). It follows that when the taxpayer failed to meet this obligation, it became liable for interest.

The decision of the District Court in *Brandtjen & Kluge, Inc.* v. *United States*, 78 F. Supp. 509 (D. Minn.), following the decision of the District Court below, directly supports the Collector's contention here. There the taxpayer had paid a deficiency with interest and the question was whether or not taxpayer was entitled to a refund of the interest when, due to allowance of a carry-back excess profits credit, the deficiency concededly was

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count of such carry-back until the close of the future taxable year in which he sustains the net operating loss or has the unused excess profits credit. He must therefore file his return and pay his tax without regard to such deduction, and must file a claim for refund at the close of the succeeding taxable year when he is able to determine the amount of such carry-back. Inasmuch as any overpayment resulting from the deduction of such carry-back does not occur, as a practical matter, until the net operating loss or the unused excess profits credit for the future taxable year is determined, and inasmuch as it is desirable to insure promptness in the filing of claims to inform the Commissioner that such deductions have been determined, this section provides that no interest will be allowed with respect to any such overpayment for any period before the claim therefor is filed, or a petition asserting such overpayment is filed with the Board of Tax Appeals, whichever is earlier.

refundable. Here, on the other hand, taxpayer had never paid the interest and the Government withheld it in refunding overpayments. (R. 5, 7.) This factual difference, though mentioned by the Court of Appeals (R. 17), as already noted (*supra*, p. 8), clearly seems immaterial.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

MAY 1949.

APPENDIX

Internal Revenue Code:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(s) [As added by Sec. 211 (a) of the Revenue Act of 1939, c. 247, 53 Stat. 862]. *Net Operating Loss Deduction.*—For any taxable year beginning after December 31, 1939, the net operating loss deduction computed under section 122.

(26 U.S.C. 23.)

SEC. 53. TIME AND PLACE FOR FILING RETURNS.

(a) *Time for Filing.*—

(1) *General rule.*—Returns made on the basis of the calendar year shall be made on or before the 15th day of March following the close of the calendar year. Returns made on the basis of a fiscal year shall be made on or before the 15th day of the third month following the close of the fiscal year.

* * * * *

(26 U.S.C. 53.)

SEC. 56. PAYMENT OF TAX.

(a) *Time of Payment.*—The total amount of tax imposed by this chapter shall be paid on the fifteenth day of March following the

close of the calendar year, or, if the return should be made on the basis of a fiscal year, then on the fifteenth day of the third month following the close of the fiscal year.

(b) *Installment Payments.*—The taxpayer may elect to pay the tax in four equal installments, in which case the first installment shall be paid on the date prescribed for the payment of the tax by the taxpayer, the second installment shall be paid on the fifteenth day of the third month, the third installment on the fifteenth day of the sixth month, and the fourth installment on the fifteenth day of the ninth month, after such date. If any installment is not paid on or before the date fixed for its payment, the whole amount of the tax unpaid shall be paid upon notice and demand from the collector.

* * * * *

(26 U.S.C. 56.)

SEC. 122 [As added by Sec. 211 (b) of the Revenue Act of 1939, *supra*]. NET OPERATING LOSS DEDUCTION.

(a) *Definition of Net Operating Loss.*—As used in this section, the term "not operating loss" means the excess of the deductions allowed by this chapter over the gross income, with the exceptions and limitations provided in subsection (d).

(b) [As amended by Sec. 153 (a) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. *Amount of Carry-Back and Carry-over.*—

(1) *Net operating loss carry-back.*—If for any taxable year beginning after December 31, 1941, the taxpayer has a net operating loss, such net operating loss shall be a net operating loss carry-back for each of the two preceding taxable years, except that the carry-back in the case of the first preceding taxable year shall be the excess, if any, of the amount of such net operating loss over the net income for the second preceding taxable year computed (A) with the exceptions, additions, and limitations provided in subsection (d) (1), (2), (4), and (6), and (B) by determining the net operating loss deduction for such second preceding taxable year without regard to such net operating loss.

* * * * *

(26 U.S.C. 122.)

SEC. 271. DEFINITION OF DEFICIENCY.

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed (or collected without assessment) as a deficiency, and decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax; or

(b) If no amount is shown as the tax by the taxpayer upon his return, or if no return is made by the taxpayer, then the amount by which the tax exceeds the amounts previously assessed (or collected without assessment) as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously abated, credited, refunded, or otherwise repaid in respect of such tax.

(26 U.S.C. 271.)

SEC. 292. INTEREST ON DEFICIENCIES.

(a) [As amended by Sec. 2 (a) of the Act of December 17, 1943, c. 346, 57 Stat. 601]. *General Rule.*—Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed * * *.

(26 U.S.C. 292.)

SEC. 711 [As added by Section 201 of the Second Revenue Act of 1940, c. 757, 54 Stat 974]. EXCESS PROFITS NET INCOME.

(a) *Taxable years beginning after December 31, 1939.*—The excess profits net

income for any taxable year beginning after December 31, 1939, shall be the normal-tax net income, as defined in section 13 (a)(2), for such year except that the following adjustments shall be made:

(1) *Excess profits credit computed under income credit.*—If the excess profits credit is computed under section 713, the adjustments shall be as follows:

* * * * *

(J) [As added by Sec. 210 (a) of the Revenue Act of 1942, *supra*]. *Net operating loss deduction adjustment.*—The net operating loss deduction shall be adjusted as follows:

(i) In computing the net operating loss for any taxable year under section 122 (a), and the net income for any taxable year under section 122 (b), no deduction shall be allowed for any excess profits tax imposed by this subchapter, and, if the excess profits credit for such taxable year was computed under section 714, the deduction for interest shall be reduced by the amount of any reduction under paragraph (2) (B) for such taxable year; and

* * * * *

(26 U.S.C. 711.)

SEC. 3771. INTEREST ON OVERPAYMENTS.

(a) *Rate.*—Interest shall be allowed and paid upon any overpayment in respect of

any internal revenue tax at the rate of 6 per centum per annum.

(b) *Period.*—Such interest shall be allowed and paid as follows:

(e) [As added by Sec. 153 (d) of the Revenue Act of 1942, *supra*]. *Claims Based on Carry-Back of Loss Or Credit.*—If the Commissioner determines that any part of an overpayment is attributable to the inclusion in computing the net operating loss deduction for the taxable year of any part of the net operating loss for a succeeding taxable year or to the inclusion in computing the unused excess profits credit adjustment for the taxable year of any part of the unused excess profits credit for a succeeding taxable year, no interest shall be allowed or paid with respect to such part of the overpayment for any period before the filing of a claim for credit or refund of such part of the overpayment or the filing of a petition with the Board, whichever is earlier.

(26 U.S.C. 3771.)

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